STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,309

)

Appeal of)

)

)

INTRODUCTION

The petitioner seeks an expungement of a finding made

by the Department of Social and Rehabilitation Services (SRS) that he abused his two older children. A Motion to Dismiss has been filed by the Department asserting that the Board is bound by an abuse adjudication made by a Family Court in a CHINS petition covering the same matters.

FINDINGS OF FACT

1. The petitioner is the father of a twenty-year-old daughter, S. L., by his first marriage. His second marriage to C. W. produced two children, A. L., a girl born in 1983, and Ja. L., a boy born in 1984. That marriage ended in divorce in 1986 and the petitioner was granted custody of the two younger children.

2. In 1987, C. W. reported to SRS that she observed bruises on her son, Ja., during a visitation. That matter was investigated and it was found by SRS that the bruises occurred due to being hit by their father and the matter was substantiated in the record.

3. In 1989, SRS received reports from a grade school that Ja. L. and A. L. had bruises on them. SRS interviewed the children, the petitioner, their mother, C. W., and their older half-sibling, S. L. SRS concluded after the investigation, which also included a medical examination, that the petitioner had bruised the children by hitting them with a belt and entered a substantiation into the registry on June 16, 1989. However, SRS never notified the petitioner of that finding. No move was made to remove the children from his home at that time.

4. In the meantime, the petitioner had married again and he and his third wife, C. L., had a child Jo. L.,

in 1989. At that time and up through February of 1992, the petitioner lived with his third wife, her two sons from a prior marriage (born in 1983 and 1985), and his four children, S. L., A. L, Ja. L., and Jo. L.

5. In February of 1992, the petitioner and his third wife separated. The petitioner continued to have at least physical custody of all his biological children. In July of 1992, C. W. came to pick up her children for visitation and again saw bruises. She contacted SRS which investigated and initiated a CHINS petition on August 3, 1992, with regard to the petitioner's three minor children, A. L., Ja. L., and Jo. L.

6. As a part of the CHINS petition, the Department alleged both recent and long-term repeated abuse of the three children and specifically alleged the findings of abuse in 1987 and 1989, and a new finding of abuse made in July of 1992, as part of its grounds for the petition. The petitioner thereafter obtained counsel and a merits hearing was held on three separate days commencing October 1, 1992, and ending November 17, 1992. The petitioner confirmed in his sworn testimony before the Board that evidence was offered during the CHINS hearings on the events which comprised the 1987 and 1989 abuse findings and that he took the stand to dispute their accuracy. Both Ja. L. and A. L. and his ex-wives testified at the hearing. The petitioner continued to be represented by an attorney until the Disposition Hearing in March of 1993, at which time the petitioner released his attorney and appeared pro se.

7. A transcript of the pertinent part of the Family Court's findings dated November 17, 1992, is attached hereto as Exhibit One and incorporated by reference herein. From that transcript it must be concluded that the Court found that the petitioner had abused both Ja. L. and A. L. ever since he first obtained custody of them and that the abuse continued in a "chronic pattern" over a number of years up until the period immediately preceding the filing of the CHINS petition. The Court specifically found that the petitioner had intentionally hit both of the children with sticks, dowels from a crib, a belt, and a metal flyswatter in an excessive manner which frequently left bruises. The Court also found that the petitioner used a cattle prod on the children as a means of disciplining them. The children were removed from his custody by Court order and were placed in the custody of their respective mothers. The petitioner has appealed the order to the Vermont Supreme Court.

8. The petitioner was not aware that SRS had made the 1989 finding against him until he read it as part of the CHINS petition and case plan. After speaking with an SRS director, he found that he had a right to appeal that determination and move for expungement. He took that action on September 21, 1993.

9. On September 29, 1993, the evidence was reviewed by the Commissioner who stood by his finding that the two children had been intentionally physically injured at the hands of the petitioner during the administration of corporal punishment with a belt. The Commissioner also asserted that the doctrine of collateral estoppel precludes the Board from relitigating issues ruled upon by the family court on November 17, 1992.

10. On November 29, 1993, the Commissioner issued a "supplemental" review letter in which it reiterated its position on the 1989 finding as to A. L. and Ja. L. It also refused to expunge a 1992 finding with regard to the youngest child, Jo. L. The petitioner did not appeal the 1992 determination.

11. The petitioner disagrees with the findings of the Family Court, has appealed them to the Vermont Supreme Court and wishes to present further evidence as to the inaccuracy of SRS' substantiation at a further Human Services Board hearing.

ORDER

The Department's decision dated June 16, 1989, finding that the petitioner abused his children, A. L. and Ja. L., is affirmed and the request to expunge that registry record should be denied.

REASONS

The petitioner has made application for an order to expunge a substantiation of abuse placed by SRS in its registry in 1989. This application is governed by 33 V.S.A. § 4916 which provides in pertinent part as follows:

(h) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under section 3091 of Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Under the statute's definitions, a report is substantiated when "the commissioner or the commissioner's designee has determined after investigation that a report is based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912(10).

The first issue presented here, is whether the Board is bound by decisions of the Family Court concluding that a child has been abused in the context of a CHINS petition or whether it is required to make its own determination as to whether abuse occurred in the context of the expungement request. The Board concluded in Fair Hearing No. 11,444 that the statute at 33 V.S.A. § 4916, (cited above) requires the Human Services Board to make an independent determination as to whether abuse occurred as that term is defined in the statute which sets up the reporting and registry requirements, regardless of such a conclusion in another forum under another statute. Therefore, the Department's Motion to Dismiss cannot be granted.

However, the Board also concluded in that same fair hearing, that it may be precluded (by the doctrine of collateral estoppel) from retrying facts found in a CHINS proceeding if the criteria set out by the Vermont Supreme Court for preclusion are met:

(1) preclusion is asserted against one who was a party or in privity with a party in the earlier action;

(2) the issue was resolved by a final judgment on the merits;

(3) the issue is the same as the one raised in the later action;

(4) there was a full and fair opportunity to litigate the issue in the earlier action; and

(5) applying preclusion in the later action is fair.

Trepanier v. Getting Organized, Inc.,

155 Vt. 259, 265 (1990)

The above criteria are clearly met in this case. The petitioner was a party in the prior proceeding which was resolved by a final judgment on the merits.(1) Although the CHINS petition was not filed until 1992, the issue of abuse of the two children, A.L. and Ja.L., during the spring and summer of 1989 was clearly before the Court and was included in the evidence and findings. The petitioner was represented by counsel throughout the merits hearing and at the time the findings were made. The procedural protections in terms of discovery and representation were superior to those found in an administrative hearing. Although the petitioner was given an opportunity to show why it would not be fair to use the Court's findings herein, he could make no such showing. His only arguments--that the matter was not before the Court (although he clearly admitted in testimony that it was) and that the Court was wrong in its decision and will be reversed by the Supreme Court--are not persuasive on the issue of fairness. If any relief is available to the petitioner on the findings of fact, it is surely from the Vermont Supreme Court, not from this Board.

As the Board is precluded from making its own new fact findings in this matter, the petitioner cannot put on new evidence and retry this matter. SRS found on June 16, 1989 that the children had been deliberately spanked or hit by the petitioner in an excessive manner in the spring or summer of 1989, leaving bruises on their bodies. That finding was confirmed after a merits hearing by the Family Court and is binding on the Board. The only task left for the Board is to determine whether the facts found by the Family Court constitute "abuse" as that term is defined in the statute which sets up the reporting and registry process.

Abuse is specifically defined in the regulations which are set out in pertinent part as follows:

(2) An "abused or neglected child" means a child whose physical or mental health or welfare is harmed or threatened with harm by the acts or omissions of his parent or other person responsible for his welfare or a child who is sexually abused by any person.

(3) "Harm" to a child's health or welfare can occur when the parent or other person responsible for his welfare:

(A) Inflicts, or allows to be inflicted, upon the child, physical of mental injury; or

. . .

(6) "Physical injury" means death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means.

33 V.S.A. § 4912

Under the above statute, evidence of harm to a child exists when there is a temporary disfigurement

inflicted other than by accidental means. The Board has previously interpreted bruises inflicted by excessive spanking to meet the definition of temporary disfigurement. See Fair Hearing No. 10,419. As these children were temporarily disfigured by bruises as the result of the petitioner's intentional (and repeated) spankings with a belt, a reasonable person could believe that they had been abused. 33 V.S.A. § 4912(10). Therefore, the Department must be found to have

met its burden and the petitioner's request to expunge the 1989 finding should be denied.

# # #

1. The petitioner has argued that there has been no "final judgment on the merits" in this case as his case is currently on appeal to the Supreme Court. However, the petitioner misunderstands that term as it is used in the Vermont Rules of Civil Procedure. Although the term "final judgment" is not defined in the rules themselves, the context of those rules shows clearly that the term is used to denote a judgment that is not an interlocutory one, as opposed to a synonym for final judicial relief. For example, V.R.C.P. 54 (b) calls for the issuance of a "final judgment" by the trial court in cases where there are multiple claims and V.R.C.P. 54 (c) requires that a trial court's ". . . final judgment shall grant the relief to which the party in whose favor it is rendered is entitled . . ."

The Vermont Supreme Court has defined the term "final judgment" as used in the above rules as a decision which "adjudicates all the remaining issues in the case and constitutes a judgment from which an appeal lies." Merozoite v. Merozoite 143 Vt. 52, 58 (1983) (emphasis supplied.) See also Mudgett v. Russell, 133 Vt., 551 (1975) and Tokarsh v. Gates 136 Vt. 353 (1978) for a similar analysis.

As the Family Court has made a judgment in this matter from which an appeal lies (and from which one was taken), it must be concluded that there has been a final judgment in this case.